

**BEFORE THE JUDICIAL QUALIFICATIONS COMMISSION
STATE OF FLORIDA
CASE NO.: 02-466**

**INQUIRY CONCERNING
JUDGE JOHN RENKE III**

SUPREME CT. CASE NO. SC03-1846

**MOTION TO QUASH SUBPOENA FOR TRIAL OR
FOR PROTECTIVE ORDER**

The Times Publishing Company (“the Times”) and its former employee Cary Davis (“Mr. Davis”), by and through their undersigned counsel, move to quash the subpoena for trial served upon Mr. Davis or, alternatively, seek a protective order. As grounds, the Times and Mr. Davis state as follows:

1. The Times Publishing Company is the owner and publisher of the *St. Petersburg Times*, a daily newspaper of general circulation serving West Central Florida. The Times has engaged in extensive coverage of the proceedings in this case.

2. Mr. Davis was employed by the Times Publishing Company full time as a professional journalist until late August 2003. Since approximately January 2004, Mr. Davis has been a full-time law student at the University of Florida. He resides in Alachua County.

3. On or about August 12, 2005, a subpoena was hand-delivered to Mr. Davis by JQC Special Counsel. The subpoena commands Mr. Davis’s appearance and testimony at trial on September 6, 2005 at 1 p.m. in Clearwater, Florida. A true and correct copy of the subpoena is attached to this motion as “Exhibit A.”

4. Attached to the subpoena is an article concerning Judge Renke authored by Mr. Davis. The article is an abridgement of a news story which originally appeared in the *St. Petersburg*

Times on March 2, 2003. A true and correct electronic copy of the news story is attached to this motion as “Exhibit B.”

5. Upon information and belief, based on JQC Special Counsel’s remarks to Mr. Davis, the Commission seeks Mr. Davis’s testimony concerning the following passage from the news story, concerning Judge Renke:

He took the bench in January as an unknown commodity. In the first seven years of his legal career, he rarely ventured into the same New Port Richey courthouse where he now rules on family law cases, domestic violence injunctions and mortgage foreclosures.

Instead, he was a behind-the-scenes attorney at his father’s law office. He spent his time intoxicated by what he calls “theoretical enterprise” ... preparing complex cases on the cutting edge of property, contracts and constitutional law.

See Exhibit B, attached, ¶¶ 6, 7.

6. Professional journalists in Florida possess a constitutional, common law and statutory privilege against being forced to testify concerning their news gathering activities and the contents of their news stories. Based on the authorities cited herein, the subpoena should be quashed and Mr. Davis should not be required to testify in this matter.

MEMORANDUM OF LAW

As the court observed in *CBS, Inc. v. Smith*, 681 F. Supp. 794, 802-03 (S.D. Fla. 1988)(internal citations omitted),

The gathering of news of political consequence is a necessary corollary to the freedom to report about politics and government Simply put, newsgathering is a basic right protected by the First Amendment; “without some protection for seeking out the news, freedom of the press could be eviscerated.”

Accordingly, both the state and federal courts in Florida recognize a qualified constitutional privilege for journalists to resist compelled testimony in both civil and criminal

cases, no matter whether that testimony is sought concerning published *or* unpublished newsgathering materials or information. *See, e.g.,* *McCarty v. Bankers Insurance Co.*, 195 F.R.D. 39 (N.D. Fla. 1998)(granting motion to quash subpoena to newspaper reporter seeking deposition concerning statements published in news story); *Kidwell v. McCutcheon*, 962 F. Supp. 1477, 1480 (S.D. Fla. 1996) (granting habeas corpus to journalist jailed for contempt for refusing to testify about interview of defendant in state criminal case); *United States v. Diaz*, 2004 WL 1944851 (S.D. Fla. 2004)(granting motion to quash defense subpoena in criminal case); *State v. Davis*, 720 So.2d 220, 223-224 (Fla. 1998)(reaffirming Florida’s recognition of journalist’s privilege against compelled testimony, emphasizing judicial responsibility to prevent journalists from being used as an “investigatory arm of the government”); *Seo v. Kim*, 2002 WL 31445224 (Fla. Cir. Ct. 2002)(quashing subpoena for television station’s raw footage and out-takes).¹

While, to be sure, the courts apply careful scrutiny to requests for compelled disclosure of confidential sources, the privilege is actually broader. *See, e.g.,* *State v. Davis*, 720 So.2d at 223-24(holding that privilege “extends to both confidential *and* nonconfidential information gathering in the course of a reporter’s employment); *Kidwell v. McCutcheon*, 961 F.Supp. at 1480 (privilege applies where no confidential source is involved because of chilling effect that

¹ The Florida Supreme Court first recognized a privilege for journalists to resist compelled testimony about their newsgathering in *Morgan v. State*, 337 So.2d 951 (Fla. 1976), when *St. Petersburg Times* reporter Lucy Morgan refused to reveal the identity of a confidential source who told her about a sealed grand jury presentment. The State sought to compel disclosure of the source’s identity so that he or she could be prosecuted for breaching the secrecy of the grand jury. The Florida Supreme Court vacated Ms. Morgan’s contempt citation and jail sentence, holding that society’s interest in unencumbered access to information from anonymous sources concerning government activity outweighed the general governmental interest in vindicating the obligation to keep secret grand jury proceedings. *See also* *Tribune Co. v. Hufstetler*, 489 So.2d 722 (Fla. 1986)(vacating contempt citation against reporter who refused to reveal identity of confidential source who revealed confidential state ethics complaint).

compelled disclosure would have on news media's constitutionally protected activities). The privilege reflects "a paramount public interest in the maintenance of a vigorous, aggressive and unfettered debate over controversial matters, an interest which has always been the principal concern of the First Amendment." *New York Times v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710 (1964); *see also Baker v. F&F Investments*, 470 F.2d 778, 782 (2d Cir. 1972).

In 1998, the journalist's privilege was codified as part of Florida's Evidence Code. *See* § 90.5015, *Fla. Stat.* (2003). The statutory incarnation of the privilege applies specifically to "professional journalists," meaning persons "regularly engaged in collecting, photographing, recording, writing, editing, reporting or publishing news, for gain or livelihood, who obtained the information sought while working as a salaried employee of, or independent contractor for, a newspaper" § 90.5015(1)(a), *Fla. Stat.* (2003). There is no dispute in this case that at the relevant time, Mr. Davis was employed by the Times Publishing Company; was regularly engaged in collecting, writing, and reporting news for his livelihood; and that his March 2, 2003 news story was reported and written by him, and published by the Times, as part of this work.

The Florida Evidence Code, not unlike the federal and Florida constitutional and common law, provides that "A professional journalist has a qualified privilege not to be a witness concerning, and not to disclose the information, including the identity of any source, that [he] has obtained while actively gathering news." § 90.5015(2), *Fla. Stat.* (2003). The information protected includes "information or eyewitness observations obtained within the normal scope of employment," the only exceptions being physical evidence, eyewitness observations or visual or audio recordings of crimes. *Id.* There is nothing in this case or in the news story at issue – and no one here contends – that Mr. Davis witnessed any crime. "Eyewitness observations of non-criminal activity are expressly covered by the privilege."

Wilensky v. Gooding, 2003 WL 21361276 (Fla. Cir. Ct. 2003)(quashing subpoena in civil case concerning judicial race between plaintiff and defendant).

Moreover, the privilege is not waived by the publication of the information sought or by speaking with parties to a proceeding or their counsel. *See* § 90.5015(4), *Fla. Stat.*

(2003)(privilege not waived by publication); *Wilensky v. Gooding*, 2003 WL 21361276

*2(privilege not waived by speaking with parties or representatives), citing *Ulrich v. Coast*

Dental Services, Inc., 739 So.2d 142, 143-33 (Fla. 5th DCA 1999) and *Seo v. Kim*, 2002 WL 31445224 (Fla. Cir. Ct. 2002).

A party seeking to overcome the journalist's privilege not to testify "must make a clear and specific showing" that:

- (a) The information is relevant and material to unresolved issues that have been raised in the proceeding for which the information is sought;
- (b) The information cannot be obtained from alternative sources; and
- (c) A compelling interest exists for requiring disclosure of the information.

§ 90.5015(2), *Fla. Stat.* (2003). *See also State v. Davis*, 720 So.2d 220, 223-24; *McCarty v.*

Bankers Ins. Co., 195 F.R.D. at 46 (application of either the common law standards or the

Florida statutory standard "will yield the same result, as the factors are virtually

indistinguishable").²

² The test is a long-standing one and is similarly phrased by the federal courts in Florida and in other circuits. *See Miller v. Transamerica Press, Inc.*, 621 F.2d 721, *modified on rehearing*, 628 F.2d 932 (5th Cir. 1980), *cert. denied*, 450 U. S. 1041 (1981); *United States v. Caporale*, 806 F.2d 1487 (11th Cir. 1986), *cert. denied*, 483 U.S. 1021 (1987)(requiring party seeking reporter's testimony to show that it is "highly relevant," necessary to the proper presentation of the case, and unavailable from other sources); *United States v. Meros*, 11 Media L. Rptr. [BNA] 2496 (M.D. Fla. 1985)(quashing criminal defendant's subpoena to newspaper editor seeking authentication of news stories and production of information used in their preparation); *United*

The JQC’s counsel is the proponent of Mr. Davis’s testimony here. As such, the Commission’s counsel must make the three-part showing described in the statute and in case law before Mr. Davis is compelled to testify. If this tribunal finds the standards for overcoming the journalist’s privilege have been satisfied, it must order disclosure by the reporter “only of that portion of the information for which the [three-part] showing [] has been made and shall support such order with clear and specific findings made after a hearing.” § 90.5015(3), *Fla. Stat.* (2003).

Turning to the facts of this case, the matter about which the Commission’s counsel apparently wishes Mr. Davis to testify concerns Judge Renke’s law practice prior to his election to the bench. The information is not attributed to a particular source in the news story – meaning that should Mr. Davis be forced to testify, he will be required to identify unnamed sources, a substantial incursion into his work product which is of heightened concern. Assuming for the sake of argument that whether Judge Renke was, as the article states, an “unknown commodity” who “rarely ventured into” the New Port Richey courthouse are matters relevant to this proceeding, this tribunal still must ask whether they are “material.” Assuming a showing of materiality, the Commission’s counsel must nevertheless show that there are no alternative sources for this information.

Certainly, numerous people besides *Times* reporters frequented the New Port Richey courthouse prior to Judge Renke’s election – other lawyers in the community, judges serving at the time, judicial assistants, and employees of the Clerk’s and Sheriff’s offices, among others –

States v. Blanton, 534 F. Supp. 295 (S.D. Fla. 1982), *aff’d*, 730 F.2d 1425 (11th Cir. 1984)(quashing government subpoena in criminal case seeking verification of statements and quotations in newspaper article); *Loadholtz v. Fields*, 389 F. Supp. 1299 (M.D. Fla. 1975)(denying motion to compel discovery from reporter).

and would be in a position to testify whether they saw Judge Renke there or were familiar with his courtroom work. Without a showing that such alternative sources have been pursued unproductively, the showing required to overcome Mr. Davis's privilege not to testify cannot be made. The privilege does not bow to efficiency.

Finally, the proponent of the reporter's testimony must show a "compelling interest exists" for requiring Mr. Davis to testify about his newsgathering. Without a showing that other sources have been pursued and exhausted, it is entirely unclear how the need for Mr. Davis's testimony could rise to the level of "compelling." The State may have a compelling interest in pursuing discipline of errant judges and candidates for judicial office, but that does not automatically create a compelling interest in securing the testimony of a journalist in that enterprise. The Commission must show, at the very least, an inability to succeed on its claims without the testimony of Mr. Davis. *See McCarty*, 195 F.R.D. at 44 (declining to compel newspaper reporter to testify where litigant "failed to show that he would be unable to succeed on his claims" without her); *Kidwell*, 962 F.Supp. at 1479 (declining to compel newspaper reporter to testify to "second-hand information" where State could not show inability to prevail at trial without him). Certainly, the Commission's counsel will not contend that it will lose its case if Mr. Davis does not testify.

CONCLUSION

The Times Publishing Company and Cary Davis respectfully submit that the subpoena commanding Mr. Davis's attendance and testimony at trial in this matter should be quashed. Mr. Davis's possession of information which may relate in some way to this case is the result of newsgathering as a professional journalist and the showing necessary to overcome his privilege

not to be forced to testify about it has not and cannot be made. In the alternative, upon specific findings, only testimony for which the legally required showings have been made should be allowed.

Respectfully submitted,

Alison M. Steele
FBN: 0701106
**Rahdert, Steele, Bryan,
Bole & Reynolds, P.A.**
535 Central Avenue
St. Petersburg FL 33701
Telephone: (727) 823-4191
Fax: (727) 823-6189

**Attorneys for Times Publishing Company
and Cary Davis**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the following via Overnight Delivery to this _____ day of August, 2005:

Judge James R. Wolf,
Chairman, Hearing Panel,
Judicial Qualifications Commission
1110 Thomasville Road
Tallahassee FL 32303

Scott Tozian
Counsel to the Judge
109 N. Brush Street, Suite 200
Tampa, FL 33602-4163

Marvin Barkin
Michael K. Green
Special Counsel to the Judicial Qualifications Commission
101 East Kennedy Boulevard, Suite 2700
Tampa, FL 33602

Thomas G. MacDonald, jr.
General Counsel
1904 Holly Lane
Tampa, FL 33629

John Beranek
Counsel to the Hearing Panel
Ausley & McMullen
227 S. Calhoun Street
Tallahassee, FL 32301

Brooke Kennerly
Florida Judicial Qualifications Commission
1110 Thomasville Road
Tallahassee, FL 32303

Alison M. Steele

